Supreme Court, U S
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No 10-812

In The
SUPREME COURT OF THE UNITED STATES

Richard Joel Domnitz,

Petitioner,

v

Lee M Reese, M.D , Feza N. Gunalp, M.D., and Sunrise Mountainview Hospital, Inc., d/b/a Mountainview Hospital,

Respondents.

RESPONDENT FEZA N. GUNALP, M.D.'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent, FEZA N. GUNALP, M D., objects to Petitioner's Questions Presented for Review as they are based upon misstatements and misapplications of Nevada Law. In particular, as discussed more fully in the body of the Opposition, the trigger which activates the one (1) year discovery statute of limitations is not patient's "state of mind " The trigger is activated by an analysis of facts, which were available to the patient, and whether those facts were sufficient to put a reasonable person on inquiry notice of the possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice. Further, the test of NRS § 41A.097(2) is an objective reasonable man test not a purely subjective test.

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of this case

CORPORATE DISCLOSURE STATEMENT

Respondent, FEZA N. GUNALP, M.D., is an individual and is filing this Opposition to Petition for Writ of Certiorari in his capacity as an individual and not
on behalf of any corporation.

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STATEMENT OF JURISDICTION

It is respondent's belief that as Petitioner did not raise the issue he seeks to have heard on his Petition for Writ of Certiorari at the state court levels, and also failed to comply with Nevada Revised Statute § 30.130 and Nevada Rules of Appellate Procedure 44 by notifying the Nevada Attorney General of his concerns regarding the constitutionality of NRS § 41A.097(2) that he has waived any right to have the U.S. Supreme Court review this issue, which was never briefed or heard at the lower court level

STATEMENT OF THE CASE

Richard Joel Domnitz, Petitioner, filed a *Petition for Writ of Certiorari* questioning for the first time the constitutionality of the Nevada Supreme Court's Decision affirming the findings of fact and law as presented in the District Court Judge's Decisions of May 26, 2009 and July 16, 2009 The District Court Judge, after considering the factual evidence in this matter - including the fact that Mr. Domnitz went to the hospital for a routine appendectomy on February 9, 2007 and ended up hospitalized for a month and underwent therapy for over a year, determined that the medical difficulties experienced by Mr. Domnitz following what he believed would be a routine appendectomy should have put him, or any other

reasonable man, on notice that a potential injury pursuant to NRS § 41A.097 had occurred.

In reaching their decisions the District Court Judge and the Three Nevada Supreme Court Judges properly applied the criteria outlined in NRS § 41A 097 as clarified and explained by Massey v. Litton, 99 Nev 723, 727-728, 669 P.2d 248,251-252 (1983.) Petitioner's *Petition for Writ of Certiorari* should be denied

AREAS OF FACTUAL DISPUTE & CLARIFICATION

Petitioner was admitted to Sunrise Mountainview Hospital in February of 2007 for a routine appendectomy. During the surgery Dr. Feza Gunalp performed anesthesiology on Petitioner including intubation A trial extubation was performed which was unsuccessful requiring Dr Gunalp to re-intubate the petitioner After several attempts Petitioner was re-intubated Due to continuing problems a tracheotomy was performed several days later. Petitioner underwent numerous complications as a result of the surgery and remained hospitalized for a month However, the only time Dr. Gunalp had contact with Petitioner was during the appendectomy surgery. He did not continue to treat Petitioner and never hid what he did during Petitioner's treatment.

Petitioner obtained his medical records, approximately 2,000 to 2,500 pages in September of 2007. The requesting of medical records can be an important factor in determining when a patient discovers their injury. Rumstrom v. Allen, 345 Mont. 314, 321-324, 191 P.3d 410, 414-416 (2008) and Grooms v. Professionals Ins. Co., 507 N W 2d 121, 124 (Wis. Ct App. 1993). Petitioner had ample opportunity to explore the issue of potential malpractice long before the records were reviewed by Dr. Doubrava, Plaintiff's expert over a year later. Review of those records was not performed by Plaintiff's expert until October 30, 2008.

REASONS PETITIONER'S *WRIT OF CERTIORARI* SHOULD NOT BE GRANTED.

1 PETITIONER HAS WAIVED ANY RIGHT TO RAISE A FEDERAL QUESTION AS TO THE CONSTITUTIONALITY OF THE ONE (1) YEAR DISCOVERY STATUTE OF LIMITATIONS AS CONTAINED IN NRS §41A.097 AS THIS ISSUE WAS NOT RAISED TIMELY IN THE COURTS BELOW.

As Petitioner Domnitz acknowledged in his *Petition for Writ of Certiorari*, He has never brought the issue of the constitutionality of NRS 41A.097(2) before any of the lower courts. *See, (Petition for Writ of Certiorari*, Page 2, Paragraph 4.) "It is generally understood that constitutional

issues not raised in earlier civil proceedings are waived on appeal." Bettencourt v. City and County of San Francisco, 146 Cal. App. 4th 1090, 53 Cal. Rptr.3d 402 (2007). Nevada law notes that "a point not urged in the trial court, unless it goes to jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." Old Aztec Mine v. Brown, 97 Nev. 49, 52, 623 P 2d 981. 983 (1981) *See also,* Britz v Consolidated Casinos Corp., 87 Nev. 441, 488 P 2d 911 (1971) and Durango Fire Protection, Inc v. Troncoso, 120 Nev. 658, 98 P.3d 691 (2004). The U.S Supreme Court will not review what the Court below did not decide. Walters v. City of St. Louis, Mo , 347 U S. 231, 74 S. Ct. 505 (1954) It is only the most exceptional of cases which are reviewed where the question was not pressed or passed on below Duignan v. United States, 274 U.S. 195, 47 S Ct. 566, 71 L.Ed. 996 (1927).

There is nothing extraordinary or exceptional about the issue Mr. Domnitz attempts to raise in his *Petition for Writ of Certiorari* He simply attempts to challenge the constitutionality of NRS § 41A 097(2) for the first time In so doing he violates Nevada law and bypasses safeguards which would have allowed this matter to be addressed by the representatives of the State of Nevada at the lower court levels

When the constitutionality of a statute is challenged in the State of Nevada the Nevada Revised Statutes require that the Attorney

General be notified and made a party to the action so the State can be heard on the issue. NRS § 30.130.[1]

Nevada Rules of Appellate Procedure, Rule 44 also requires that the Attorney General be notified of any matter which questions the constitutionality of a legislative act where the state or its agency, officer or employee is not a party so that the Attorney General may represent the state on the disputed issue.[2]

In the present matter Petitioner did not raise the issue of constitutionality of NRS § 41A.097(2) at either the trial court level or the State Supreme Court appellate level Nor did he ever make the Nevada Attorney General aware of any contemplated challenge to the statute Therefore, his argument that NRS § 41A.097 is unconstitutional should be deemed waived and the *Petition for Writ of Certiorari* denied.

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[1] When declaratory relief is sought, all persons shall be made parties, who have or claim any interest which would be affected by the declaration if the statute is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceedings and be entitled to be heard NRS § 30 130

[2] If a party questions the constitutionality of an Act of the Legislature in a proceeding I which the state or its agency, officer or employee is not a party in an official capacity, the questioning party shall give written notice to the clerk of the Supreme Court immediately upon the filing of the docketing statement or as soon as the question is raised in the court The Clerk shall then certify that fact to the Attorney General NRAP 44

2. NRS § 41A.097(2) IS NEITHER VAGUE NOR UNCONSTITUTIONAL ON ITS FACE.

In his question no. 1, Petitioner questions the constitutionality of Nevada Revised Statute 41A.097(2) *for the first time* with his *Petition for Writ of Certiorari* to this Court In phrasing his first question for consideration by the Court he seems to indicate that NRS 41A.097 is unconstitutionally vague and violates 14th amendment due process law as it has a shorter statute of limitation triggered by "discovery of injury"[3] and potential malpractice and a longer statute of limitations based upon the actual date malpractice may have occurred based upon the date that medical services were provided. The determination of which statute applies is triggered by whichever occurs sooner, either discovery of injury by the patient, or that the requisite time specified from the medical procedure expires.

Statutes of limitation are creatures of the legislature and not the judiciary They are by definition arbitrary, their operation does not discriminate between the just and unjust claim.

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[3] Petitioner incorrectly states that the shorter statute of limitation is based upon patient's "state of mind "

They exist to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared and evidence has been lost. Chase Security Corporation v Donaldson, 325 U S 304, 314, 65 S. Ct. 1137, 1142, 89 L.Ed 1628 (1945). Statutes of limitations are established to cut-off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. Kavanagh v. Noble, 325 U.S. 535, 539, 68 S.Ct 235, 92 L Ed. 150 (1948). Courts are not authorized to rewrite a statute because they might deem its effects susceptible to improvement. Badaracco v. Commissioner of Internal Revenue, 464 U.S 386, 104 S.Ct. 756, 78 L Ed. 2d 549 (1984) Further, it has long been recognized that the establishment of statutes of limitation are within the jurisdictional power of the legislature of the state. Kuperman v. Assessment Appeals Bd. No 1, 137 Cal. App 4th 918, 931 (Cal. App 4th Dist. 2006)

> A constitutional right is always subject to reasonable statutory limitations as to the time within which to enforce it, if the constitution itself does not provide otherwise. The power of the legislature to provide reasonable periods of limitations, therefore, is unquestioned, and the fixing of time limits within which a particular right must be asserted is a matter of

> legislative policy the nullification of which is not a judicial prerogative Id

In the present matter the Nevada State Legislature passed NRS 41A.097 In the parts pertinent to this Petition it states

> (2) Except as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more that 3 years after the date of injury ***or*** 1 year after Plaintiff discovers or through the use of reasonable diligence should have discovered the injury **whichever occurs first**, for (a) injury to or wrongful death of a person occurring on or after October 1, 2002. [4] (Emphasis added).

The statute of limitations, like any other statute, is to be construed according to the manifest intention of the Legislature, and in ascertaining such intention, the language used should be construed, if possible, according to the usual meaning of the words. Wren v. Dixon, 40

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[4] Prior to the 2002 amendment the statute of limitations was four years after the date of injury or two years after the Plaintiff discovers or through the use of reasonable diligence should have discovered the injury whichever occurs first

Nev. 170. 161 P. 722 (1916). *See also,* Kuperman v. Assessment Appeals Bd. No. 1, 137 Cal. App 4th 918, 931 (Cal App 4th Dist. 2006)

Contrary to Petitioner's argument, Nevada Revised Statutes 41A.097(2) is neither vague nor unconstitutional because it provides for two potential statutes of limitations; and further provides the basis for selection of the controlling statute of limitations as "*whichever occurs first*."

Giving the language of the statute its usual and ordinary meaning, in complete context, it is clear that when a patient has discovered or should have discovered that he was injured and that the injury was potentially the result of medical malpractice he has a one year window to investigate the potential malpractice and bring a lawsuit. The Nevada Supreme Court has defined "injury" as contained in the statute to mean "legal injury." They have further defined when and how a patient discovers their legal injury. "Discovery may be either actual or presumptive " Massey v Litton, M.D., 99 Nev. 723, 727, 669 P 2d 248,251 (1983.) However, "discovery. . . must be of both the fact of damage suffered and the realization that the cause was the health care provider's negligence " Id. The Nevada Supreme Court has further clarified when the one year discovery statute of limitations begins to run. "The statute of limitations begins to run when the patient has before him or her facts which would put a reasonable person on inquiry notice of the

possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice. **The focus is on the patient's knowledge or on access to facts, rather than on her discovery of legal theories.** Massey v. Litton, 99 Nev. 723, 727-728, 669 P.2d 248,251-252 (1983)(Emphasis added.)

Pursuant to the language of Massey v Litton, *supra,* the standard to trigger the one year discovery statute of limitations is not the patient's subjective knowledge. The standard is a reasonable man standard and is determined by what facts are known to the patient and whether a reasonable man with access to those facts would be on inquiry notice of potential malpractice. If so the statute of limitations begins to run

If the patient is not on inquiry notice or has no reason to be on inquiry notice then the three (3) year statute of limitations runs from the time the medical procedure was performed.

The language of NRS 41A.097(2) is not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application as discussed in Connally v. General Construction Co., 269 U S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). The facts of Connally v. General Construction Co , *Supra*, Lanzetta v. New Jersey, 306 U.S. 451 (1939), and Greene v McElroy, 360 U.S. 474(1959) are inapposite to the present matter

It appears from the language of paragraph 4 of Page 2 of Mr. Domnitz's *Petition for Writ of Certiorari* that Petitioner himself does not have any problem with the actual language of the statute only with its application to his case. He specifically concedes the statute is neither vague nor unconstitutional as written. He states;

> The federal question could not be raised in the regular course of the proceedings because the Nevada Supreme Court Order itself created the issue for review here. Had the Nevada Supreme Court simply followed the factors set forth in its own case law, no due process issues would be present, and there would not be a constitutionally vague statute (Petition, Page 2, Paragraph 4)

The statute as written and as interpreted by the Nevada Supreme Court in Massey v. Litton, 99 Nev 723, 727-728, 669 P.2d 248,251-252 (1983) is neither vague nor in violation of the 14th Amendment Due Process Clause of the U S. Constitution This Court should uphold the findings and Order of the Eighth Judicial District Court and the Nevada Supreme Court and deny Mr. Domnitz' *Petition for Writ of Certiorari*

3 NRS § 41A 097(2) DOES NOT RELY ON THE SUBJECTIVE STATE OF MIND OF A PATIENT TO DETERMINE WHEN THE ONE (1) YEAR DISCOVERY STATUTE OF LIMITATIONS IS TRIGGERED.

In his question for Review No. 2 Petitioner again misconstrues Nevada law and the facts of this case Mr Domnitz states that NRS § 41A 097(2) relies on a "person's state of mind" to bar a lawsuit. He then argues there was no evidence of Domnitz's "state of mind" in this matter.

As discussed above the factors which determine whether a person knows or should know that his physical injury was or may have been the result of medical malpractice is what facts he is aware of and whether those facts were sufficient to put a reasonable man on inquiry notice of a potential medical malpractice lawsuit

Pursuant to the language of Massey v. Litton, 99 Nev. 723, 727-728, 669 P 2d 248,251-252 (1983) the standard to trigger the one year discovery statute of limitations is not the patient's subjective knowledge The standard is a reasonable man standard and is determined by what facts are known to the patient and whether

a reasonable man with access to those facts would be on inquiry notice of potential malpractice

If the test were the subjective state of mind of the patient, as advocated by Petitioner, then it would be very easy to defeat the discovery statute of limitation by claiming ignorance of the malpractice or possibility of malpractice. (This is exactly what Petitioner is trying to do.) It would be very difficult to refute such allegations, whether or not true, without proceeding to full trial That is why it is knowledge of facts not legal theories which initiates the running of the one year statute of limitations Hershberger v Akron City Hospital, 34 Ohio St. 3d 1, 5, 516 N.E.2d 204, 207 (1987) *Compare,* Massey v. Litton, 99 Nev. 723, 727-728, 669 P.2d 248,251-252 (1983).

The Court in Hershberger v. Akron City Hospital, 34 Ohio St. 3d 1, 5, 516 N.E.2d 204, 207 (1987) defines injury as follows:

> We find the better construction of the term "injury" is set forth in the third approach. Therefore, in a medical malpractice action, for the purposes of determining the accrual date in applying the statute of limitations. the trial court must look to the facts of the particular case and make the following determinations: when the injured party became aware, or should have

> become aware, of the extent and seriousness of his condition, which, of course, may occur without the necessity of further medical consultation; whether the injured party was aware, or should have been aware, that such condition was related to a specific professional medical service previously rendered him; and whether such condition would put a reasonable person on notice of need for further inquiry as to the cause of such condition. Id [5] (Emphasis added.)

4 THE NEVADA SUPREME COURT PROPERLY APPLIED THE LANGUAGE, FACTORS, AND DEFINITIONS CONTAINED IN NRS §41A.097(2) AND MASSEY V LIBBEY TO THE FACTS IN THIS MATTER.

In the present matter the District Court Judge and the participating Nevada Supreme Court Judges followed the law as outlined in NRS § 41A.097(2) and Massey v. Litton, 99 Nev. 723, 727-728, 669 P 2d 248,251-252 (1983). An examination of the "Order on Defendant Lee M. Reese, M D 's Motion to Dismiss Plaintiff's

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[5] This is precisely the approach outlined in Massey v Litton, M D , 99 Nev 723, 669 P 2d 248 (1983)

Complaint", which is attached to Mr. Domnitz's *Petition for Writ of Certiorari* as Appendix "B" demonstrates the thought processes of the District Court Judge and her utilization of the Massey v. Litton factors in determining that a reasonable man, with access to the facts at Mr. Domnitz's disposal, would have made the connection between his injuries and the medical procedures of February 11, 2007 and been on inquiry notice of the potential malpractice and the need to further investigate and file a suit within one year. As outlined in the "Order" there was sufficient factual basis for the District Court Judge to determine that a reasonable man would have been on inquiry notice of the possible cause of action The three judge panel of the Nevada Supreme Court similarly determined, after review of the briefs and appendices to the State Court Appeal that based upon the factors outlined in Massey v. Litton, M D , 99 Nev. 723, 728, 669 P.2d 248, 252 (1983) the district court was correct in its determination that Mr. Domnitz had inquiry notice prior to a year before his complaint was filed, and therefore the statute of limitations expired before Mr. Domnitz filed his complaint. The Nevada Supreme Court determined that Mr. Domnitz knew or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action.

Contrary to Petitioner's contentions, the Nevada Courts followed the common sense

meanings and common understandings of the words found in NRS § 41A.097(2) and the factors and definitions of injury found in the case of Massey v. Litton, M.D., *Supra,* in deciding that the statute of limitations had run in this matter prior to Petitioner filing his complaint. The Nevada Supreme Court in the present matter neither created a new statute or a new interpretation of NRS § 41A.097(2) The citizenry of Nevada and their attorneys have a clear understanding of when the one (1) year statute of limitations as contained in NRS § 41A.097(2) and discussed in Massey v. Litton, M D., 99 Nev. 723, 728, 669 P 2d 248, 252 (1983) begins to run.

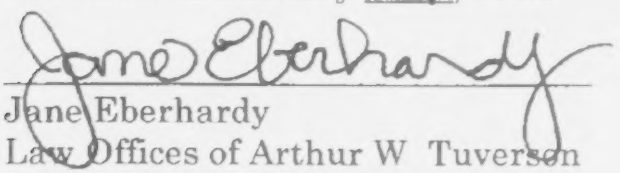
CONCLUSION

Petitioner has requested that this Court grant a Writ of Certiorari to review the Nevada Supreme Court decision in Richard Joel Domnitz v Lee M Reese, M.D , Feza N Gunalp, M D and Sunrise Mountainview Hospital, Inc. d/b/a Mountainview Hospital, (S.C. No. 54055)

It appears that Plaintiff is seeking a finding that a review on a writ of certiorari would be proper under U S Supreme Court Rule 10(c). As noted above the decision rendered by the District Court Judge and the Nevada Supreme Court in this matter was proper and followed both Nevada Statutory and Case Law Petitioner was not denied any rights under the United States or the Nevada Constitution His due process was not

violated. The factors outlined in United States Supreme Court Rule 10(c) are inapplicable to the facts of this case. Therefore, Petitioner's *Petition for Writ of Certiorari* should be denied.

Executed on January 19, 2011



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